IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2021-443-47
CRI-2021-443-48
CRI-2021-443-49
[2021] NZHC 3265

BETWEEN	KAOSS WAYNE PRICE Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 15 December 2021

Appearances: N Bourke for Appellant
J M Marinovich for Respondent

Judgment: 20 December 2021

JUDGMENT OF GRICE J

Overview

[1] Mr Price appeals his sentence[1] of two years and six months' imprisonment on a lead burglary charge[2] and 32 other charges that include reckless driving, motor vehicle theft, offensive weapon, police chases, failing to stop, escaping custody and theft.

[2] Mr Price appeals on the basis that the combined uplift for the other charges of 33 months was manifestly excessive, that insufficient credit was given to his youth, and that the end sentence was manifestly excessive. The offending occurred over a period of approximately 12 months: November 2020 to October 2021.

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1 *Police v Price* [2021] NZDC 21466.
2 Crimes Act 1961, s 231: maximum penalty of 10 years' imprisonment.

Background

[3] In addition to the lead burglary charge, the sentencing Judge analysed the balance of the offending in four groupings.

[4] As the appeal turns on whether the uplifts for various groups of offences when taken cumulatively reflected the totality of the offending, I set out the facts in full following the Judge's analysis.

8 July 2021 (lead burglary)

[5] Mr Price went into the victim's home through an unlocked front door and went into the living room area. Mr Price sat down and smoked a cigarette inside before tossing it on the floor. He then took a set of car keys for a Bighorn vehicle owned by the victim and drove it away. The victim was awoken by the sound of his vehicle being taken from the address and driven down the drive.

Offending set 1: 5 November 2020

[6] In the early hours of the morning, Mr Price drove to a service station, fuelled up with $60 worth of petrol and drove off without paying. He was suspended from driving at the time.

[7] Later that morning, at 8.35am, a police car attempted to stop the appellant and turned on its red and blue lights. Mr Price accelerated toward a shopping area, took a wide turn and momentarily lost control, before continuing toward oncoming traffic. The vehicle then approached a pedestrian crossing where school children were forced to take evasive action to avoid being hit. The police pursuit was abandoned.

[8] Shortly afterwards, the appellant's vehicle crashed into two occupied vehicles, one of which had young children inside. The appellant drove away from both crashes. He stopped a short while later and ran but was arrested. Following a car search, 2.5 gram of methamphetamine was found along with a knuckle duster. A compulsory impairment test showed the appellant had methamphetamine and cannabis in his blood.

Offending set 2: 18 May to 6 July 2021

[9] On 18 May, Mr Price was given keys to a car which he promised to return that evening. He did not. Following inquiries made by the victim's family, the car was located and recovered. However, the appellant took the car again that evening.

[10] On 21 May, the appellant drove the car to a petrol station, filled it up with $30 worth of petrol before driving off without paying. An employee ran out. The manner in which Mr Price drove led the employee to believe he was going to be hit.

[11] On 22 May, the appellant went to another gas station, filled it up with $50 worth of petrol and drove off again without paying. Later that day, Mr Price was a passenger in the car when police signalled the car to stop. After the driver got out and approached police, Mr Price moved into the driver's seat and drove off at speed. Police followed and signalled to stop with red and blue lights, but due to the speed, the police did not pursue.

[12] The next day, the appellant drove to a different gas station and again drove away without paying for $50 worth of petrol.

[13] On 28 May, the appellant was found at an address where police were making enquiries. When he was told he was under arrest, Mr Price resisted and tried to break free as a police officer tried to hold him to be handcuffed. Mr Price broke free, sprinted away and was unable to be located.

[14] On 1 June, the appellant was at a bar where he took a victim's keys to her car as well as her wallet and took the victim's car.

[15] The next day he was driving that car when police spotted him and signalled him to pull over. The appellant complied. As police approached the vehicle, he sped off. Later that day, the vehicle was located abandoned.

[16] On 4 June, the appellant, driving a different car, was pulled over by police. He drove off and was unable to be located.

[17] On 13, 14 and 16 June, Mr Price drove to three different petrol stations and he drove off without paying for fuel he took, amounting to $90, $60 and $80 worth, respectively.

[18] On 24 June, Mr Price attempted to do the same. A police car then parked in front of the appellant's vehicle. Mr Price stopped refilling, threw the fuel hose over his roof, moved into the driver's seat and reversed at speed. The police followed the appellant with active red and blue lights. The appellant accelerated and drove through several stop signs, driving approximately 100km per hour, in a 50 km per hour zone. At one point he swerved into and narrowly missed a parked police car. The appellant also drove on the wrong side of the road.

[19] On 6 July the appellant drove a car that had earlier been stolen to a gas station before driving off with $139.24 worth of fuel without paying.

Offending set 3: 22 October 2020

[20] Having been bailed to his grandmother's home, the appellant removed a gold ring from her handbag. When asked to return it, Mr Price responded, "get fucked". While she slept, Mr Price located keys for a car parked outside and drove off, at which point he was suspended from driving. Later, the victim noticed her ring, iPhone and tinderbox were missing, valued at $2,780.

Offending set 4: Other offending

[21] On 25 July 2020, the appellant stole a tip jar containing $150 from an unattended counter at a cinema.

[22] On 3 October 2020, the appellant stole an iPhone containing a debit card, which he used to purchase goods at two gas stations, totalling $58.40.

[23] The appellant also stole a car which contained the victim's keys and wallet. He used two bank cards to purchase goods at two locations, totalling $181.17.

[24] On 22 October 2020, the appellant was served with a three-month demerit suspension, in breach of that suspension. On 1, 3, 9 and 24 November, the appellant drove to different gas stations and drove off with $80, $30, $100 and $80 worth of petrol without paying, respectively. On the second occasion the store attendant inactivated the pump when Mr Price attempted to put in more petrol.

[25] Later, on 3 November, police followed the appellant and active blue and red lights. Mr Price accelerated and narrowly missed a collision.

District Court decision

[26] The Judge first noted the lead charge was a "reasonably serious burglary", involving breaking into in a dwelling house, while the victim was at home asleep. The Judge set a starting point of 18 months. No issue is taken with this starting point on appeal.

[27] The Judge then set out the factual background of the four sets of offending and applied the relevant uplifts:

(a) nine months was given on a totality basis for all offending on 5 November;

(b) nine months was given on a totality basis for all offending between 18 May and 6 July;

(c) six months was given for the specific offending on 22 October; and

(d) nine months for the remaining charges, a review of the earlier sentences and offending while on bail.

[28] The Judge gave a 25 per cent discount for Mr Price's guilty plea. He noted the "illuminating" information in the cultural report, for which a 15 per cent discount was applied, totalling 21 months.

[29] This led to an end sentence imposed of two years and six months' imprisonment.

Law on appeals against sentence

[30] Section 250 of the Criminal Procedure Act 2011 governs first appeals against sentences. It provides that an appeal court must allow the appeal if for any reason there is an error in the sentence imposed and a different sentence should be imposed.

[31] The focus is on the end sentence rather than the process by which the sentence is reached.[3] The Court will not intervene where the sentence is within range and can be justified by accepted sentencing principles.[4]

[32] If an appeal is allowed this Court may set aside the sentence and impose another sentence, vary the sentence or any part or condition of the sentence or remit the sentence to the District Court with directions to amend the sentence.[5]

Summary of submissions

[33] The appellant submits that insufficient regard was given to the totality principle in applying the uplifts. The appellant says that an adjusted starting point in the range of three to three and half years' imprisonment would be appropriate. As for a youth discount, the appellant submits that, in light of *Churchward v R* (as discussed below),[6] a discount of 15 per cent should have been applied. No issue is taken with the 18-month starting point for the lead burglary charge.

[34] The respondent submits that each set of uplifts were appropriate given the offending, and that the overall starting point of 51 months (four years and three months) was appropriate to reflect the totality of the offending. The offender was described as a "one-man crime wave" who placed the public in danger on several occasions. The respondent also submits that, at most, a credit of five percent could be

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3 *Ripia v R* [2011] NZCA 101 at [15]; and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
4 *Larkin v Ministry of Social Development* [2015] NZHC 680 at [26].
5 Criminal Procedure Act 2011, s 251.
6 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

given for youth and this would merely be tinkering with the sentence. Standing back, the end sentence was not out of proportion with the gravity of the totality of the offending.

Uplifts for offending

Appellant submissions

[35] The appellant submits that, although mentioned, the Judge gave insufficient regard to the totality principle. Not only should each offence be considered individually, but the offender's overall culpability should be assessed to determine what sentence appropriately reflects the totality of their conduct.[7] In this case, the total end sentence should not have been determined sequentially and adjusted for each individual offence or group of offences but rather, the analysis should have been guided by the appreciation that the total period of imprisonment should be in proportion to the overall offending.[8]

[36] The appellant notes that the 51-month starting point greatly exceeds that taken in any of the authorities cited for offending "sprees" with a lead burglary charge.

[37] Most offending was low-level, the defendant says. The thefts, involving goods of less than $500 in value had maximum penalties of three years. This is borne out by the relatively low level of reparation sought by police, of $4,119.40. The appellant submits such offending pales in comparison to that in *Hamilton v Police*, where 19 separate burglaries with a total value of over $100,000 led to an adjusted starting point of three years and 10 months.

Respondent submissions

[38] For the 5 November 2020 offending, the respondent submits that the nine months was within range, given the totality of the offending. The respondent refers to the desperate and extremely dangerous driving that placed young children near a

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7 *R v Bradley* [1979] 2 NZLR 262 (CA); *R v Strickland* [1989] 3 NZLR 47, (1989) 4 CRNZ 632; and *R v Dodd* [2013] NZCA 270 at [32]-[33].

8 *Haywood v R* [2015] NZCA 551; and *Ogden v R* [2016] NZCA 214 at [64].

school pedestrian crossing in clear danger. The cumulative sentence was warranted as the offending was discrete and unrelated (to the lead burglary charge).

[39] For offending between 18 May and 6 July, the respondent submits the unlawful taking of a motor vehicle, escape from custody, operating a vehicle dangerously and various thefts could have justified a starting point between 18 months and two years, in light of *Wood v Police*.[9] The cumulative sentence was warranted and lenient.

[40] The respondent submits the 22 October offending involved theft of goods of a relatively significant amount ($2,780 in value) as well as unlawful taking of a motor vehicle, which, in light of *Wood v Police*, would have justified a starting point of 15 to 18 months. The six-month[10] cumulative sentence for that offending is within range

[41] The respondent submits that the "other" offending is to insignificant, and therefore an uplift for this totality is not excessive.

Analysis

[42] The appellants pointed to the case of *Nelson v Police*, in which a two year and four-month starting point was set for a 22-year-old who pleaded guilty to a lead burglary charge and a raft of other charges not dissimilar to those in present cases.[11] The appellant also pointed to other cases involving less serious offending with lower starting points.

[43] In relation to *Nelson*, there are some clear differences with the present case. The most significant is that *Nelson* did not feature the reckless driving and endangering of the public that is apparent in this case. These factors bear on totality.

[44] The Crown referred to *Wood v Police*. It says the specific penalties applied to the sets of offending here might be seen as lenient in comparison. This is in view of the fact the Court has said the single unlawful taking charge can give rise to a starting point of 18 months "if the offence has a significant aggravating feature or features".[12]

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9 *Wood v Police* [2018] NZHC 1629.
10 The Crown submissions refer to nine months.
11 *Nelson v Police* [2019] NZHC 2434.
12 *Wood v Police*, above n 9, at [24].

[45] Some of the groupings of the offences involved repeated low-level theft at petrol stations. The repetitive nature does increase the seriousness of the offending.

[46] This case is more serious than that of *Nelson* for the reasons stated above. However, *Hamilton v Police* was significantly more serious in relation to the number of burglary charges and the significant amount of stolen goods. However, the present case does have the added factor of public endangerment.

[47] The totality principle requires consideration of all the offending, rather than simply discrete uplifts for sequential groupings of events. In each grouping, the uplifts appear within range. However, it is their combined amount that seems out of proportion with the offending, especially in light of the authorities cited.

[48] In my view while the discrete sets of offences were properly analysed the sentence uplift applied for those on a cumulative basis (including the uplift for offending while on bail) led to a totality which was out of range. The starting point of 51 months was manifestly excessive. A starting point between 40 to 45 months would be the range.

Youth discount

[49] Youth discounts are not automatic but require reference to the defendant's age at the time of the offence.[13] The Court of Appeal in *Churchward* described in detail why such discounts are applied to take into account the neurological difference between young people and adults (which bear on culpability) and the adverse effect of imprisonment on young people.[14] Such a discount will also vary by circumstance.[15] In *Pouwhare v R*, the Court of Appeal stated:[16]

> … the fact than an offender is a young person can sometimes be given radical effect on sentence, unconstrained by any normative percentage, even where offending is serious. In other cases that is not possible. The young age of the offender cannot be accorded presumptive, let alone paramount, weight. The objective seriousness of the offending, the young person's part in it, anything aggravating and otherwise mitigating must also be weighed. …

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13 *R v LB* [2020] NZHC 94 at [42].
14 *Churchward v R* [2011] NZCA 531 at [78]-[85].
15 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [83].
16 At [96].

[50] The appellant notes the case of *Waikato-Tuhenga v R*,[17] where a discrete 15 per cent discount was allowed for youth in addition to a 15 per cent discount for the appellant's personal and cultural background. In this case, the appellant says the offending is the architype of that described in *Churchward.* Mr Price was young, immature and making impulsive decisions that lacked judgment. This was the sort of offending described in *Nelson v Police* as youthful, impulsive, stupid, substance-fuelled offending committed by a young person without structure in life. Therefore, a discount of 15 per cent would be warranted.

[51] The respondent submits that such a discount is not presumptive but weighed in an objective analysis against the seriousness of the offending. Mr Price was already subject to a sentence of supervision for other offending. He has committed consistently over a significant period of time, on occasions putting the public at risk. At most, only a five per cent discount could be given. Mr Marinovich, for the respondent, acknowledged the factor of youth had not been considered and should have been.

[52] Youth is an important factor here. The offending has the hallmarks of the type of offending discussed in *Churchward* and *Nelson*. Some offending involved highspeed chases, which did put the public at risk and is a factor to be taken into account when considering a discount for youth.

[53] *Churchward* has recognised that Mr Price's behaviour may in part be attributable to brain development, which in young males may remain immature up to the end of a person's twenties. There will be occasions where the public interest requires the discount that would otherwise be applied for youth to be reduced.[18] Such occasions have included motor manslaughter[19] or serious violent offending where deterrence and public protection have prevailed.[20] However, despite the fact there were vehicle offences which put the public at risk, I do not consider Mr Price's offending to fall into a category that requires the discount for youth to be reduced.

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17 *Waikato-Tuhenga v R* [2021] NZCA 503.
18 *Tahuri v R* [2013] NZCA 254 at [42] and [43].
19 *Ormsby v R* [2013] NZCA 578.
20 *Arahanga v R* [2014] NZCA 379.

[54] I also note that some of the factors considered in the cultural report also bear out that youth was a factor in this offending. In Mr Price's case, this is particularly exacerbated by the lack of support and his transient and chaotic family life. It is perhaps surprising that this is the first non-community-based sentence Mr Price has faced.

[55] I reach the conclusion, given the factor of his youth, a discount of 10 per cent is appropriate in these circumstances.

Conclusion

[56] I conclude the uplifts applied were manifestly excessive and there was an error in the totality consideration. An additional discount for youth would be appropriate in this case. Failure to consider that factor was an error.

[57] Taking a starting point of 45 months and a discount for the guilty pleas (25 per cent), with personal background factors attracting a discount (15 per cent) and youth (10 per cent), the result is an end sentence in the vicinity of 23 months imprisonment. This is not an exact arithmetical exercise but, in my view, that reflects the totality of the offending, taking into account the youth and personal factors. It is also sufficient to reflect the principles of sentencing, including deterrence and denunciation, but is the least restrictive in the circumstances.

[58] This makes Mr Price eligible for home detention.[21] There is currently no address available under the pre-sentence report.

[59] The report also notes Mr Price is at a high risk of reoffending. The cultural report notes his high level of immaturity and lack of support. There are not strong indications supporting rehabilitation however that must be balanced against his relative youth and background to date.

[60] I grant leave to apply to the District Court for substitution of the sentence of imprisonment for one of home detention if a suitable residence is found. If such an

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[21] Under s 80I(2) of the Sentencing Act 2002.

application is made, the Judge hearing that application will have the benefit of my comments as to the nature of the offending when considering the suitability of the proposed residence and appropriate conditions.

Result

[61] The appeal is allowed. The sentence is quashed. A sentence of 23 months is imposed with leave to apply for home detention.

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Grice J

Solicitors:
Bourke Law, Ngāmotu | New Plymouth, for the Appellant.
Crown Solicitor, Ngāmotu | New Plymouth, for the Respondent.